PUBLIC PROSECUTOR

v.

FOONG SEK HOONG

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CRIMINAL TRIAL NO. 4 OF 1985]
8 FEBRUARY 1989

CRIMINAL PROCEDURE: *Application to adduce documentary evidence - Return of motor car to prisoner's wife - Showing inconsistency of prosecution's version of events - Order of Supreme Court - Judge to reconsider on new evidence - Prosecution witness misled Court - Possession highly suspect - Dangerous Drugs Act 1952, s. 39(B)(1)(a).*

The accused was convicted of an offence under s. 39(B)(1)(a) of the Dangerous Drugs Act 1952. The accused had successfully obtained an order from the Supreme Court to adduce certain documentary evidence relating to the return of a motorcar to his wife. Such evidence was crucial in showing inconsistency of the prosecution's version of events. Following the order of the Supreme Court the case was remitted back to the High Court before the same Judge to consider the said evidence in the light of all other evidence that was adduced by the prosecution.

Held:

[1] In reconsidering the totality of the evidence adduced at the trial in the light of the unchallenged documentary evidence produced by the prisoner's wife and the evidence of PW1 and PW3, the Court took into account that many aspects of the evidence of the prisoner and his witness were rejected by the Court because it had been misled by the certain prosecution witnesses in that car was not at all at the scene.

[2] The Court found the assertion by PW1 that he did not find the bunch of keys when he searched the accused at the scene was very hard to believe.

[3] The evidence of the prosecution witness relating to the dropping of a package by the prisoner is highly suspect.

[4] The prisoner in the light of the new evidence and after a review of the total evidence had succeeded in creating a reasonable doubt on the prosecution's case.

[Acquitted and Discharged.]

Legislation referred to:
Dangerous Drug Act 1952, s. 39B(1)(a)

For the public prosecutor - Raus bin Shariff, DPP
For the prisoner - Manjeet Singh Dhillon; M/s. Lawrence, Dhillon & Associates

JUDGMENT

KC Vohrah J:

Foong Sek Hoong was convicted by me for an offence under s. 39(1)(a) of the Dangerous Drug Act 1952 on 31 October 1987.

The Supreme Court, on 5 December 1988, allowed an application by Foong Sek Hoong to adduce the following documentary evidence, namely:

Surat Akuan menerima dated 15 September 1984 issued by Insp. Megat Mohd Aminuddin of the Cawangan Anti Dadah in respect of the return of motor car WAW 7807 to one Ngan Yuet Meng in connection with Jalan Bandar report no. 16926/ 84.

The Supreme Court also ordered that the case be remitted back to the High Court before the same Judge to consider evidence admitted together with any evidence that may be adduced by the prosecution on this point and to come to a decision.

Ngan Yuet Meng, Inspector Megat Aminuddin & Detective Constable Jaffar bin Mahadar gave evidence at the hearing of this matter (hearing).

Ngan Yuet Meng, designated as DW4, stated that she was wife of the prisoner Foong Sek Hoong. She stated that Inspector Megat gave her the Surat Akuan menerima (D17) on 15 September 1984, and, with it, she was handed a bunch of keys to enable her to fetch the prisoner's car, WAW 7807. It was a red Nissan Sunny and she took it from the Cawangan Anti Dadah, Jalan Hang Tuah.

The prosecution recalled Inspector Megat (PW1). He said that he remembered that when he gave evidence at the trial of the prisoners on 27 October 1987 he did not mention that he took possession of a car belonging to the prisoner. And he admitted issuing D17 to the prisoner's wife, DW4.

He explained that after the prisoner was taken back to police headquarters (on the day of his arrest, 6 September 1984) he interrogated the prisoner in his office. He was alone with him. During the interrogation the prisoner handed him keys to his car. He said he did not know where the keys came from. He stated that he then called Detective Mohd. Isa to take possession of the car from the scene and that the latter went with Detective Police Constable Jaffar to take possession of the car. The car was brought to the police headquarters and he inspected the car. He said he did not lodge a police report in respect of the seizure of the car as he did not find anything incriminating in the car. He agreed that he did not inform the Deputy Public Prosecutor about the seizure of the car and he denied that the car was seized when the accused was arrested at the scene.

He confirmed handing over to DW4 document D17 and returning the car. He said that he kept a copy of D17 in his office but did not know where it was; it was not put in the investigation papers as the car "has nothing to do with the case".

DPC Mohd Isa, who allegedly received the car keys from Inspector Megat and took possession of the car, was not called as a witness. Instead DPC Jaffar Mahadar (designated as PW7) gave evidence at the hearing. He said that on the night of 6 September 1984 at about 9.00 p.m. he was present when the prisoner was arrested. He said that after the police went back to the office he and DPC Mohd Isa went back to the scene and recovered the car at about 11.00 p.m. DPC Mohd Isa handed the keys to Insp. Megat at 11.15 p.m. that night. It was a bunch of keys. He said he made a police statement about the seizure but that was after the conclusion of the trial of the prisoner. PW7 also agreed that when the prisoner was arrested at the scene all his pockets were searched by Inspector Megat but he said he could not remember if Inspector Megat recovered anything from the pockets.

The evidence adduced at the hearing showed that there was a car, on the night in question, at or near the scene which belonged to the accused and that two police personnel went to the scene (after the accused had been arrested and brought to the police station) to recover the car. And as the car held no incriminating object it was returned to the wife of the prisoner. It formed the subject matter of the document D17 which had been admitted at the start of the hearing. *Ex facie* with the evidence-in-chief of the witnesses at the hearing an innocuous explanation had been given for document D17 and matters connected therewith.

But considered on the totality of the evidence adduced at the hearing and of the evidence adduced at the trail some disquieting features become apparent.

At the close of the case for the prosecution at the trail, the clear evidence was that no car key was found on the accused's person when he was arrested and searched and that the accused was brought to the police station in a police car. There were findings of the Court made on the evidence of Inspector Megat (PW1), Detective Corporal Mohd. Nor (PW2) and the evidence of Inspector Lai (PW6) who said that at about 11.30 p.m. the night of the arrest Inspector Megat handed to him the accused, the drug exhibits and the police report.

From the answers given by them at the trial in relation to the defence claim of the car keys being found on the prisoner's person at the scene of the arrest and of the prisoner's car being at the scene and his being taken to the police station in the car it was clear that the prisoner did not have any car keys at all on his person and the prisoner's car was not at all at or near the scene. Both Inspector Megat and Detective Corporal Mohd. Nor had opportunity to state that although the accused was not brought to the police station in his own car the accused in fact did have a car at the scene and that it was recovered subsequently that very night after the prisoner if the evidence of PW1 at the hearing is to be believed had given to Inspector Megat his car keys.

At pp. 10 and 11 of the appeal record, in relation to the evidence of Inspector Megat under cross-examination at the trial, this is what was recorded:

Q: You searched the accused's pocket?

A: Yes.

Q: You recovered his car key?

A: No. There was no car key found.

Q: In fact you took him to police station in his own car driven by one your men?

A: I took the accused person in my car.

At p. 14 of the record this is recorded:

Q: Put-when you detained the accused he was standing in front of the house?

A: Not true.

Q: You detained him and searched him and nothing was found on him?

A: Not true.

Q: But you got his NRIC and his car key from his pocket?

A: I got the IC from his pocket.

It will be noted that Inspector Megat had opportunity to state that although he did not find any key in the accused's pocket he did recover it from the prisoner when he interrogated him at the police station as he is claiming now; and that the car was recovered at the scene subsequently by two of his men. By his silence he misled the DPP and the Court to believing that the prisoner did not at all have any car keys on his person and that he did not have his car at the scene.

The evidence given by Detective Corporal Mohd. Nor, at pp. 21 to 25 of the appeal record, in the light of the evidence of Inspector Megat, both given at the trial, but without the benefit of document D17 and the attendant evidence adduced at the hearing, confirmed the evidence of Inspector Megat at the trial that no car key or car belonging to the prisoner was found at the scene of the arrest at any time.

At the trial the Court was of the view that the car key or car of the accused was never seized. It is also clear that the DPP who had the file of investigation papers with him at the trail was totally unaware that the car keys and the car of the prisoner had been seized in respect of the case and this is clearly confirmed by Inspector Megat who gave evidence at the hearing that he did not put a copy of D17 relating to the seized car in the investigation papers; that he did not report the recovery of the keys or car to Inspector Lai, the investigating officer at the trial. As was mentioned earlier, Inspector Lai made no mention of such seizures and I relied also on this fact in coming to the conclusion that neither key nor car was found at the scene at all.

But the point is that Inspector Megat and Detective Corporal Mohd. Nor who had been subjected to questioning about the key and car could, and in fact should, have informed the DPP about the subsequent seizure of the keys and car, if true, and the DPP an experienced and senior officer, would no doubt have applied to recall these witness or to call some other police witness who was aware of the seizures, to testify as to the seizures and clear the wrong impression that he and the Court had formed that no key or car at all was seized in connection with the case. PW7 did at the hearing state that he made a statement about the seizure of the car but this statement, on his own admission, was made well after the trial of the accused had concluded.

I mentioned that the evidence of Detective Corporal Mohd. Nor at pp. 21 to 25 of the appeal record confirmed the evidence of Inspector Megat at the trial that no key or car was seized at the scene or at all. However in the light of the documentary evidence, D17, and the evidence adduced at this hearing Detective Corporal Mohd. Nor's evidence assumes a different complexion.

This is his evidence in relation to the key and the car.

At p. 21 of the appeal record this is what was recorded:

Q: Who searched body of accused?

A: At time of incident there was no body search.

Q: You mean you did not conduct a search?

A: Upon arrest the accused let go something and that package was inspected by PW1

Q: Anybody else did body search at that time?

A: No.

Q: How did Inspector Megat get his particulars?

A: That I don't know.

Q: Remember recovering accused's car key from accused?

A: Don't remember.

The above extract seems to show that no car key was found no the accused's person at the time of the arrest as no search was made on the accused's person.

On re-examining his other reply, this time in relation to the prisoner's car, which at p. 25 of the record reads:

Q: When going to the police station who brought car of accused police station?

A: Nobody.", it does appear, seen in the light of the documentary evidence, D17, adduced at the hearing, that the prisoner's car was indeed at the scene at the time of the prisoner's arrest - it does appear hat above extract shows that there was no denial of the prisoner's car being at the scene - only that nobody took it to the police station.

Viewed in the context of his answer to a question put by the DPP his reply seems to reinforce the distinct that he knew the prisoner's car was at the scene. He was asked at p. 24 of the record, "Do you know if accused had car at time of arrest?" and his answer was not "No" or that the prisoner had no car but "The accused was walking. I confirm that he was brought to police station by Inspector Megat in Inspector Megat's car".

The point is that the prisoner in the allegations put to Inspector Megat and Detective Corporal Mohd. Nor and in his defence claimed that he was searched and his car keys were found on his person and that he was taken to the police station in his red Datsun car. He denied the prosecution story that he was arrested as he came out from a lane beside house no. 17D, Jalan Gelang and that he was then in possession of a package of 17 packets of heroin and that he dropped the package.

He, notwithstanding the Deputy Public Prosecutor's various questions put to him to show that he did not go there by car or that he had no car at the scene, stated that he went to the scene that night by car although his house was about 400 metres away; he drove his car there by using another road because there was a one way street; he normally drove the car to the scene as the lane was quite dirty, the drains were dirty and the lane had puddles of water. He stated that that night he parked his car about 50 feet away from the said house.

He said there as he stood in front of the house he saw many people approaching the front portion of the house with some torchlights switched on. As the group approached him somebody identified himself as the police and handcuffed his lands behind him. Then a body search was conducted on him. From the back pocket of this trouser his wallet was taken out and his NRIC, too, was taken out. Subsequently the front pocket of his trousers was searched and his keys were taken out.

He said that after the search he was pushed into the house. The police conducted a search, with their torchlights switched on, for about 15 to 20 minutes. During the search one member of the police party went out and then somebody called out from outside and they all went out. And he saw a member of the police party holding a packet of things and showing it to the other members of the police. One of the police party asked him if the package belonged to him and he answered in the negative. The police subsequently took him in his own car, driven by Inspector Megat, to the police station.

I had in my judgment rejected his claim that he went there by car, that his car keys were found on his person and his claim and the claim of his friend, DW3, that the package of things was found outside the house and not on the prisoner's person. I stated at p. 89 of the appeal record:

> To my mind the elaborate story of the accused of the keys being found on his person and that his car had been driven there by him and that the police took him in his car to the police station is an attempt to discredit the prosecution's evidence that he was seen coming out of a lane before he was arrested and that while being detained be dropped the package containing heroin. But as I have pointed out it is highly improbable that there were car keys found and that the car of the accused was there.

In my judgment then I dealt with the absence of the car keys and car at scene in rejecting the evidence of the accused and his friend DW3 who said he saw the accused being taken away in the accused's car.

In reconsidering the totality of the evidence adduced at the trial in the light of document D17 produced by the prisoner's wife and of the evidence of Inspector Megat and DPC Jaffar at the hearing I have to bear in mind that many aspects of the evidence of the prisoner and his witness DW3 were rejected by me because I had been misled to believe that the car was not at all at the scene although, in the context of the equivocal reply of Detective Corporal Mohd. Nor that he could not remember if a car key had been recovered from the prisoner and his non-denial of the accused's car being present at the scene, there is doubt to Inspector Megat's assertion at the hearing that the prisoner gave him his car keys while being interrogated at police station.

The wife of the prisoner had at hearing stated that Inspector Megat gave her a "bunch of keys" and she was not challenged on this. The new prosecution witnesses, Detective Police Constable Jaffar, at the hearing, stated that he saw his companion DPC Mohd Isa hand over a bunch of keys (and he showed the large amount of keys by cupping his fingers to show the amount) to Inspector Megat after he and his companion had recovered the car. But if it was a bunch of keys how is it that this bunch of keys was missed by Inspector Megat when he made a body search of the prisoner at the scene of the arrest? The bunch of keys surely could not have been missed. I find Inspector Megat's assertion that he did not find the bunch of keys when he searched the accused at the scene - that he recovered only NRIC - as very hard to believe.

The other matter that gravely troubles me is why Inspector Megat did not hand over the bunch of keys and the car which allegedly were brought to him at 11.15 p.m. the night of the arrest to the investigation officer, Inspector Lai? He handed the accused and the seized package of heroin and the police report to Inspector Lai at 11.30 p.m. that night. The car and keys were seized in connection with the arrest of the prisoner. Why were they not handed over to Inspector Lai? He said he did not find anything incriminating in the car but it was up to the investigation officer to be seized of that fact and for him to put up the complete investigation into the whole case. Then if the matter appeared to be unimportant why was the car detained for 9 days (from 6 September 1984 to 15 September 1984) before it was released? Then again when the car was returned D17, or a copy thereof, was not filed amongst the investigation papers. Why not? There was a considerable number of irregular practices leading one to wonder why that was so.

Considering all these matters for which there is no satisfactory explanation and considering that none of the prosecution witnesses mentioned at all about the prisoner's car keys and his car being at the scene, the evidence of the prosecution witnesses relating to the dropping of a package by the prisoners is highly suspect. Why would the prisoners come out from a lane which led to his house 400 metres away if his car was already at the scene? Surely the bunch of keys with the key to the car must have been discovered when the prisoner was bodily searched at the scene as the claimed. Could there be an untruth in the prosecution's claim that he dropped the package of drugs in the circumstances? My view is that the prisoner in the light of the new evidence and after a review of the total evidence, has succeeded in creating a reasonable doubt on the prosecution's case and I therefore acquit and discharge him.

Also found at [1989] 2 CLJ 1259